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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1919

No. [redacted]155

THE UNITED STATES OF AMERICA *ex rel.* MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY,

Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States,

Appellee.

Motion for Leave to File Brief of the Workingmen's Cooperative Publishing Association as *Amicus Curiae* and Brief.

WORKINGMEN'S COOPERATIVE PUBLISHING ASSOCIATION,
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ALBERT S. BURLESON, Postmaster General of the United States,

Appellee.

Motion for Leave to File a Brief of the Workingmen's Cooperative Publishing Association as *Amicus Curiae.*

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Workingmen's Cooperative Publishing Association, a membership corporation, incorporated under the laws of the State of New York, and having its office in the City of New York, publisher of The New York Call, a daily newspaper, by S. John Block and Seth Shepard, its attorneys, moves this honorable Court for leave to file a brief as *Amicus Curiae* in the above-entitled cause.

The Workingmen's Cooperative Publishing Association seeks to intervene as *Amicus Curiae* on account of

the important public question involved in this case and on account of the possible effect of the Court's decision of this appeal upon an appeal now pending in the Court of Appeals in the District of Columbia in a similar action commenced by the Workingmen's Cooperative Publishing Association against the said Postmaster General, in which action the Supreme Court of the District of Columbia has granted a petition for a writ of mandamus. The Postmaster General has appealed from the determination made in said action by Mr. Justice WILLIAM HITZ. Said appeal has not yet been argued.

Dated, January 6, 1921.

Respectfully submitted,

THE WORKINGMEN'S COOPERATIVE PUBLISHING ASSOCIATION,

By S. JOHN BLOCK,

SETH SHEPARD,

Attorneys.

IN THE

Supreme Court of the United States

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No. 482

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Appellant,

vs.

ALBERT S. BURLESON, Postmaster General of the United States,

Appellee.

Brief of Workingmen's Cooperative Publishing Association as *Amicus Curiae.*

This is an appeal from a determination of the Court of Appeals of the District of Columbia, affirming the refusal of the Supreme Court of the District of Columbia to grant to the relator, Milwaukee Social Democratic Publishing Company, publisher of The Milwaukee Leader, a writ of mandamus requiring Albert S. Burleson, Postmaster General of the United States, to restore to the relator's publication its second-class mailing right which the Postmaster General had cancelled or revoked.

The Milwaukee Leader is a daily newspaper, published in the City of Milwaukee, Wisconsin. It was duly admitted to the second class mails and continued for a

number of years to enjoy the benefits of that classification so essential to the existence of a newspaper or other periodical publication, the rate of postage being substantially lower in that classification than in other mail classifications. Because of miscellaneous articles published in various issues of The Milwaukee Leader, which articles, in the opinion of the Postmaster General, violated provisions of the Espionage Law, the Postmaster General cancelled or revoked the second-class mailing right of that newspaper, thus compelling said newspaper to discontinue its mail circulation.

The appellant maintains and it appears to be admitted that it has sustained and will continue to sustain irreparable injury through the alleged unwarranted act of the Postmaster General in revoking its second-class mailing right and that relief can be had only by the writ of mandamus sought in this action. The allegation of such irreparable injury is predicated upon the loss of subscribers, loss of advertising and the increased cost of postage. Similar losses would be sustained by any newspaper or other periodical publication improperly excluded or removed from the second-class mail classification.

The Postmaster General is wholly without legal power to refuse to grant or to cancel or revoke the second-class mailing right of a newspaper or periodical publication which complies with the provisions of the postal statutes pertaining to matter of the second class.

The following statutes embrace the conditions upon which a publication *"shall be admitted to the second class":*

> "Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the

conditions named in sections twelve and fourteen." (United States Compiled Statutes, §7304, being Act of March 3, 1879, chapter 180, §10, 20 Stat., 359.)

"Matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject; Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same." (United States Compiled Statutes, §7305, being the Act of March 3, 1879, chapter 180, §12, 20 Stat., 359.)

"The conditions upon which a publication *shall be* admitted to the second class are as follows: First, It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second, It must be issued from a known office of publication. Third, It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. Fourth, It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." (United States Compiled Statutes, §7306, being Act of March 3, 1879, chapter 180, §14, 20 Stat., 359.)

The Postmaster General seeks to justify his action by declaring that the appellant's newspaper is not, to

quote from his notification addressed to the appellant, "a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class, it being in conflict with the Act of June 15, 1917 (Espionage Law)," although, as will be shown hereafter, the Espionage Law does not confer any power upon the Postmaster General to refuse to grant or to revoke a second-class mailing right because one or more separate issues of a newspaper or other periodical publication may contain matter which, in the opinion of the Postmaster General, transgresses the provisions of the Espionage Law.

It is further respectfully submitted that the action of the Postmaster General is not one involving a mere discretionary power and is subject to judicial review and correction.

POINT I.

The act of the Postmaster General in revoking or annulling the second-class mailing right of the relator's publication was not authorized by law, was contrary to law and deprived the relator of a right which it had not forfeited. The relator is entitled to a writ of mandamus commanding the Postmaster General to vacate, rescind and annul the order made by him denying the use of the mails to The Milwaukee Leader as second-class matter.

The Postmaster General revoked or annulled the second-class mailing right or privilege of The Milwaukee Leader because in his opinion certain issues of said publication published prior to the time of the revocation of the second-class rights contained articles or other mat-

ters which in his opinion violated the provisions of the Espionage Law, and were therefore non-mailable.

The answer of the Postmaster General contains a collection of excerpts from articles and other matter which appeared in The Milwaukee Leader at various times. Upon these articles and probably upon others not included in the answer the Postmaster General arrogated to himself the right to revoke the second-class mailing right of The Milwaukee Leader. This brief will not enter upon an unnecessary discussion of these various articles with reference to their violation or non-violation of the Espionage Law. It is not deemed necessary here and now to justify the publication of these articles. It may for the purpose of argument be assumed, but in no way conceded, that the articles in question did in some way violate the provisions of the Espionage Law. Such violation, however, if any there was, by any article or articles appearing in certain specific issues of The Milwaukee Leader, while they may have warranted the withholding from circulation through the mails of the specific issues containing the alleged objectionable matter, and while they may also have warranted a prosecution of the relator or of alleged liable individuals, for violation of the Espionage Law, did not warrant or justify the Postmaster General in revoking the second-class mailing right of the paper.

It is specific matter which is made non-mailable by the Espionage Law, and not the newspaper or periodical, as a continuing publication, which is made non-mailable. The issues of a newspaper or periodical which contain no matter which violates the Espionage Law are not in conflict with that law and do not become non-mailable either in the second class of mail matter or in any other class because certain other issues of the newspaper or periodical may have contained matter which was in conflict with the Espionage Law.

The Espionage Law (Act of June 15, 1917), title XII, is as follows:

> "§1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing of any kind in violation of any of the provisions of this Act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier: Provided, That nothing in this Act shall be so construed as to authorize any person other than an employe of the Dead Letter Office duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.
>
> "§2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing of any kind containing any matter advocating or urging treason, insurrection or forcible resistance to any law of the United States is hereby declared to be nonmailable."

The other titles of the Espionage Law refer to various acts of interference with the foreign relations, neutrality and the foreign commerce of the United States, acts of espionage, and provide for the punishment of such acts. Nowhere in the Espionage Law is there a provision with reference to the revocation of the mailing rights of a newspaper or publication. The Espionage Law makes no reference to classes of mail matter. It proscribes certain matter as absolutely non-mailable and directs that such matter shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier. If The Milwaukee Leader as a continuing publication became non-mailable through the publication of certain articles in certain specific issues it became non-mailable

in the several classes of the mails. It did not, however, become non-mailable, and neither the Espionage Law nor any other statute provides that it became non-mailable.

Nor is there any warrant in law or in philology for the assertion by the Postmaster General that because certain issues of The Milwaukee Leader contained certain alleged objectionable matter The Milwaukee Leader ceased to be a "newspaper or other periodical" within the meaning either of the Postal Laws or of the Espionage Law. It should be noted that the citation which was served by the Postmaster General upon the relator required the relator to show cause why the authorization of admission of The Milwaukee Leader to the second-class of mail matter should not be revoked upon the ground that "the publication is not a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class, it being in conflict with the provisions of the law embodied in §481½, Postal Laws and Regulations." Neither the Postal Laws nor the Espionage Law justifies the assertion that The Milwaukee Leader is not a newspaper or other periodical publication within the meaning of the law governing mailable matter of the second class.

From the time when The Milwaukee Leader was admitted to the second-class mails until the second-class mailing right was revoked, a period of several years, The Leader was undoubtedly a newspaper within the meaning of the law governing second-class mail matter. It did not cease to be a newspaper because it contained this or that editorial or this or that article or this or that cartoon. Nor, as has been said, did it cease to be a newspaper entitled to circulate through the second-class mails.

The Milwaukee Leader has always met the following conditions upon which a publication shall be admitted

to the second class of mail matter: (1) It is regularly issued at stated intervals at least four times a year, it being a daily newspaper, and it bears a date of issue and the issues are numbered consecutively. (2) It is issued from a known office of publication. (3) It is formed of printed paper sheets without substantial binding such as distinguishes printed books from periodical publications. (4) It is originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts or some special industry and has a legitimate list of subscribers and it is not designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

The foregoing statement of requirements are those embodied in §7306 of the United States Compiled Statutes hereinbefore quoted in full. It should be noted that the provisions of said section are absolutely mandatory. Upon compliance with the conditions enumerated, a publication "shall be admitted to the second class." The statutes may be searched in vain for any provision of law which gives the Postmaster General a right to revoke the second-class mailing rights of a publication which continues to conform with the requirements of said section. It is only when a publication ceases to conform with any of those requirements that the Postmaster General may after a hearing revoke the second-class rights and place the publication in question in another classification.

To gratify his desire to inflict some kind of punishment upon appellant and its neswpaper because "the tendency of the paper is seditious," to quote the declaration of the Postmaster General, he has arrogated to himself the power to impose upon the relator the severe hardship of its deprivation of its second-class mailing rights, without any express or implied authority in law for such

summary action. Grand juries have been in session continuously since the enactment of the Espionage Law, but it seems that the relator has never been indicted, either for publishing articles alleged to be in violation of the Espionage Law or for any other alleged misconduct. The Department of Justice, vigilant, well equipped and extremely active in wartime prosecutions, evidently found no cause for instituting a prosecution against the relator. The Postmaster General himself took no steps to institute such a prosecution. No private person took any steps to institute such a prosecution. There has been no adjudication of any wrongdoing by the relator in the publication of The Milwaukee Leader, save in the mind of the Postmaster General.

The Court of Appeals of the District of Columbia (47 Washington Law Reporter, 349), in its opinion in this case, said, at page 350:

> "A more difficult question is presented however when we come to consider the right of the Postmaster-general to make a blanket order refusing the second class mail privilege to that publication in the future, which in practical effect is a refusal of mail privileges. The statute contains no express grant of such authority. This is significant, in view of the fact that Congress deemed it necessary to grant such authority in respect to 'any fraudulent lottery, gift enterprise or scheme for the distribution of money,' &c. (§3929, R. S.)."

The Court clearly stated that it did not appear that the Postmaster General had authority to revoke the second-class mailing rights, but because of the finding by the Postmaster General that the publication in question had published a number of articles "with intent to interfere with the operation or success of the military or naval forces of the United States," the Court would

not grant the remedial process of a mandamus. The Court did, however, conclude its opinion with the following words:

> "Should it" (the relator) "present for transportation in the mails 'mailable matter of the second class' (§3877, R. S.), and the Department should refuse to receive it, a different case would be presented. There is no showing here of such offer and refusal."

It is difficult to reconcile the decision of the Court of Appeals with the foregoing quotations from its opinion. The decision was erroneous. The Postmaster General had no power to make a finding that the publication in question had published a number of articles "with intent to interfere with the operation or success of the military or naval forces of the United States." Such a finding could be made only by a trial jury in a properly instituted prosecution, after indictment, against the appellant or other defendant for alleged specific violation of the Espionage Law.

In the case of *The United States of America, ex rel. Workingmen's Cooperative Publishing Association* v. *Albert S. Burleson, Postmaster General of the United States,* for a writ of mandamus to compel the restoration of the second-class mailing right to The New York Call, Mr. Justice Hitz of the Supreme Court of the District of Columbia, granted the application for a mandamus and said in the opinion rendered by him on August 25, 1920 (probably reported in a recent volume of the Washington Law Reporter):

> "Whatever application, if any, the Espionage Act may properly have at the present time, and in the present posture of the war with the Imperial German Government which gave it birth, its operation certainly cannot now be enlarged by

> implication. That act, as amended by the act of May 16, 1918, contains no express grant of authority to the Postmaster General to exercise whatever power the act gives him by a blanket order operating in future upon issues of a periodical publication not yet in existence, and consequently not yet subject to the examination of the Department. The Post Office Department apparently asserts the possession of an implied power under this statute to make such a blanket order denying second-class mail privileges for the future to a periodical publication because of alleged past violations of the statute in past issues of the periodical. The Court can find no such authority in the statute. Fraud or wrong doing is never to be presumed."

The foregoing applies to the present case as strongly as it applies to the case just cited.

In *Duncan Townsite Co.* v. *Lane, Secretary of the Interior*, 245 U. S., 308, the Court said at page 311:

> "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles."

The Duncan Townsite case was cited in the opinion of the District of Columbia Court of Appeals in this case, and while the Court cited the Duncan Townsite case as an authority in support of its refusal to exercise its discretion in favor of granting the mandamus, the principle expressed in the matter just quoted requires its favorable application in the present case. In the present case

mandamus is sought not only in the exercise of a sound judicial discretion, but also as a matter of right. It cannot be gainsaid that a great wrong has been committed by the Postmaster General in revoking the second-class mailing rights of The Milwaukee Leader. That wrong can be remedied only by the writ of mandamus which is sought in this action. Surely it cannot be said that the granting of this writ would promote a wrong. The Milwaukee Leader is admittedly a newspaper of general circulation. It may circulate through the more expensive classifications of first and third-class mails at the present time. To permit it to circulate also through the second-class mails, as is its clear right under the provisions of the Postal Laws above quoted, would promote the proper administration of the law, would encourage respect for the law and would discourage unwarranted super-legal acts of public officials. The granting of the writ would not work a public or private mischief and would be within both the letter and the spirit of the law. Indeed a refusal to grant the writ would be tantamount to an approval of the Postmaster General's violation of the Postal Laws pertaining to second-class matter, which expressly state that a publication shall be admitted to the second-class mails upon compliance with the conditions above enumerated. And so long as that publication conforms with such conditions or requirements it has an absolute legal right to the benefits of the second-class classification.

The cases of *Duncan Townsite Co.* v. *Lane*, 245 U. S., 308, and *Arant* v. *Lane*, 249 U. S., 367, cited in the opinion of the District of Columbia Court of Appeals in the Milwaukee Leader case as authorities for the proposition that mandamus, a remedial process, is awarded not as a matter of right but in the exercise of sound judicial discretion and upon equitable principles, did not involve an

absolute right independently and clearly conferred by statute, such as the right of a publication to circulate through the second-class mails upon compliance with the requirements of mail matter for that classification.

The Duncan Townsite Company case was a petition for a writ of mandamus to compel the Secretary of the Interior to restore the name of Nicholas Alberson, deceased, to the rolls under the Choctaw-Chickasaw agreement of July 1, 1902 (32 Stat., 641) and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission. Under that Act, only the names of persons alive September 25, 1902, were entitled to entry on the rolls. Alberson had died before that date. The entry of his name and the issue of the certificate were procured by fraud and perjury. The Court said at page 310:

> "But enrolment and certificates may be canceled by the Secretary of the Interior for fraud or mistake because although the equitable title had passed the land remained subject to the supervisory power of the Land Department until issue of the patent, unless under the statute the power expires earlier by lapse of time. * * * (p. 311). The title conferred by the allotment is equitable only, so that supervisory power remained in the Secretary of the Interior. We are not required to decide whether the power to remove Alberson's name from the rolls had, because of §2 of the Act of April 26, 1906, expired before the Secretary acted. For the Supreme Court of the District did not order the name restored, and its judgment was acquiesced in by the relator. The claim which the relator makes in this court rests wholly upon the fact that the relator was a bona fide purchaser for value. But the doctrine of bona fide purchaser for value applies only to purchasers of the legal estate. It 'is in no respect a rule of property, but a rule of inaction.' Pomeroy, Equity Jurispru-

> dence, §743. • • • (p. 312). The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity, to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose."

It will readily be seen that the exercise of a sound judicial discretion warranted the denial of the writ of mandamus in the Duncan Townsite Company case. There was not present in that case an absolute right, which the relator asserts in the present case, based upon unequivocal statutory mandate.

In the case of *Arant* v. *Lane, Secretary of the Interior*, 249 U. S., 367, the relator was removed from office and was forcibly ejected from a government office building. He waited twenty months before applying for a mandamus against his superior, the Secretary of the Interior, to compel reinstatement. The Court, in the absence of a satisfactory explanation by the relator, held that the delay amounted to *laches*, it appearing that another appointee had meantime been filling the office, performing its duties and drawing the salary. Here also was a situation in no way analogous to that which is presented to the Court in the present case, and quite properly the Court refused to exercise its discretion in favor of the writ. The Court said at page 371:

> "This court has lately said that while mandamus is classed as a legal remedy it is a remedial process which is awarded not as a matter of right but in the exercise of sound judicial discretion and upon equitable principles. *Duncan Townsite Co.* v. *Lane*, 245 U. S., 308. It is an extraordinary remedy which will not be allowed in cases of doubtful right. *Life & Fire Ins. Co.* v. *Wilson*, 8 Pet., 291, 302. And it is generally regarded as not embraced within statutes of limitation applicable

> to ordinary actions, but as subject to the equitable doctrine of *laches*. * * * (p. 372). When a public official is unlawfully removed from office, whether from disregard to the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service. * * * We agree with the Court of Appeals that it is entirely unnecessary to consider whether the removal of the relator from office was technically justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed."

The relator in the *Arant* case just cited presented no facts to the Court showing an absolute right to the relief sought. In the present case the relief sought is a matter of absolute right, not affecting any government department or any employees in any government department, but affecting only the rights and property of the relator and its newspaper.

The legal principles which apply to the granting of a writ of mandamus were well stated in the case of *Dancy* v. *Clark*, 24 App. D. C., 487, the Court saying at page 499:

> "But in the consideration of this matter it must be remembered that while the writ of mandamus may now be regarded as having become a writ of right, there is yet a sound judicial discretion reposed in the courts, even though the petitioner for it may be technically entitled to it, to refuse to grant it when its issuance would not promote the substantial ends of justice, or when it would prove unavailing, or when it would be without beneficial results to the relator or petitioner."

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> to ordinary actions, but as subject to the equitable doctrine of *laches*. * * * (p. 372). When a public official is unlawfully removed from office, whether from disregard to the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service. * * * We agree with the Court of Appeals that it is entirely unnecessary to consider whether the removal of the relator from office was technically justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed."

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> "But in the consideration of this matter it must be remembered that while the writ of mandamus may now be regarded as having become a writ of right, there is yet a sound judicial discretion reposed in the courts, even though the petitioner for it may be technically entitled to it, to refuse to grant it when its issuance would not promote the substantial ends of justice, or when it would prove unavailing, or when it would be without beneficial results to the relator or petitioner."

It follows that when the petitioner is technically entitled to the writ and when its issuance would promote the substantial ends of justice and would result beneficially to the relator or petitioner, the writ must be granted.

The Postmaster General in his answer alleges that the second-class privilege was granted to the relator in December, 1911, and that the authority given was revocable upon determination by the department that the publication does not conform to the law; but the Postmaster General does not allege in his answer that the relator's publication ceased to conform with any of the provisions of the Postal Laws relating to second-class mail matter. It is only when a publication ceases to conform with any of those provisions that it must forfeit its right to the second-class privilege, and the Postmaster General has unquestionable authority to serve notice upon a publisher that his publication having ceased to conform with all of the requirements pertaining to second-class matter must be removed from that classification. It has occurred that a publication having been admitted to the second-class mails was removed from that classification because it was either erroneously placed in that classification or because it ceased to conform with the requirements entitling it to that classification. Such a situation existed in the case of *Houghton* v. *Payne*, 194 U. S., 88, which was a bill in equity filed by the firm of Houghton, Mifflin & Company against the Postmaster General praying that a certain publication known as the Riverside Literature Series be entered and transmitted through the mails as second-class mail matter and for an injunction to restrain the cancellation of a certain certificate of entry previously issued allowing such transmission. It was shown that although a second-class mail permit had been issued for the publication in question, since it complied with the external characteristics and conditions of second-class

mail matter, nevertheless internally and in substance the series of periodicals did not have the characteristics of second-class matter, but had the peculiarities of books and were in fact books. The act of a former Postmaster General in classifying the Riverside Literature Series as second-class mail matter was overruled and the publication was removed from that classification.

The Postmaster General may argue that The Milwaukee Leader does not conform to the law because certain of its separate issues contained editorials or other matter which in his opinion violated the Espionage Law. A newspaper is a continuing publication. Its contents change from day to day. It may on one or several occasions publish articles which may be justly criticized and which may fall within the inhibition of statutes relating to non-mailable matter; but that fact does not and cannot justify the arbitrary revocation of second-class mailing rights for all subsequent issues of the publication, regardless of the mailability or non-mailability of any particular issues. The Postmaster General does not cite and cannot cite any legal authority which confers upon him such a drastic power.

As was correctly said by the Court of Appeals of the District of Columbia in the present case, the refusal of the second-class mail privilege is in practical effect a refusal of mail privileges. The rates of postage for second-class mail matter under the statutes are substantially lower than those for matter in other classifications. Congress established the second-class classification for the purpose of enabling newspapers and periodicals to extend their circulation beyond the confines of the town or cities in which they were published. Without that second-class mailing right, a newspaper must confine its circulation practically to the town or city in which it is published. It is alleged that its mail circulation has been

completely destroyed by the Postmaster General's revocation of its second-class right. It is alleged that its advertising income has suffered as a result of such revocation. It is a matter of common knowledge that practically all newspapers have substantial mail circulation and that without a second-class mailing right they would be deprived of such circulation and might in some cases be forced to cease publication entirely.

Whether or not all or any of the articles which appeared in issues of The Milwaukee Leader which the Postmaster General alleges were declared non-mailable by the Postoffice Department, violated the Espionage Law, is immaterial to the questions here presented. The Espionage Law afforded a remedy for any public wrong committed by the appellant by the publication of any of said articles. As has been stated, it does not appear that either the Postmaster General or the Department of Justice nor any private person sought that remedy, and that there was ever a prosecution of the relator. The relator is entitled to the presumption that none of said articles infringed the law, and this presumption is fortified by the fact that in no instance was a prosecution instituted. There has been no competent and legally authorized finding by the Postmaster General himself that any of said articles infringed the Espionage Law; and even were he now to assert that he has made such a finding, the law does not empower him to determine the method of punishment and to inflict upon the relator a revocation of its second-class right.

Prior to the passage of the Espionage Act, the powers and duties of the Postmaster General had been clearly defined. The broadest duty ever heretofore imposed upon the Postmaster General was the duty in respect to fraudulent uses of the mails. The duty was expressly imposed. When, "upon evidence satisfactory to him,"

the Postmaster General finds that a fraudulent scheme, such as a lottery, "is being conducted," he may instruct his postmasters not to deliver to the person who is violating the law mail addressed to him. The constitutionality of the "fraud order" law was upheld in *Public Clearing House* v. *Coyne*, 194 U. S., 597, on the ground that in this legislation Congress was merely declaring what mail matter should be excluded from the mails. The right of Congress to exclude objectionable matter was identical with its right to classify mail matter and rested upon its constitutional authority "to establish postoffices and post roads." Since the postal service was "a public function established by Congress for the public welfare," it could authorize an executive officer to prevent such actual use of the mails as would assist in the consummation of a fraud on the public and thus defeat the very purpose of the service. Consequently the Postmaster General was given no authority to refuse mail deposited for transmission by the violator of the law. He could only refuse to deliver to him mail addressed to him. This mail had to be returned to the postoffice whence it was mailed, with the word "fraudulent" stamped on it. Even under these limitations, there might be some innocent mail thus returned. But the Court said that this would be an accidental result of an exercise of the valid power to exclude objectionable matter. The Court also did not fail to point out that the order only covered registered mail and that it did not affect the personal mail of the officers and agents of the Public Clearing House.

Because of Justice Brown's definition of the mail service as a "public function," the respondent in this case may assert that the Supreme Court held in that case that the use of the service is the exercise of a privilege and not of a right. But the question was not before

the Court, which carefully refrained from deciding any such point. In the later and ably argued case of *Lewis Publishing Co.* v. *Morgan*, 229 U. S., 288, the Court took pains to define the scope of its decisions. It said that in exercising the power it had over the mails Congress "was not excluding from the mails generally but only from the right to participate in and enjoy the privileges accorded by the second-class classification." The legislation was "not enacted as an exercise of legislative power to regulate the press, to curtail its freedom and under the assumption that there was a right to compel obedience to the command of legislation having that object in view, to deprive one who refused to obey, of all right to use the mail service."

The Supreme Court has never gone further than to say that Congress can determine what mail matter shall be excluded. It has not decided that either Congress or the Postmaster General has the right to exclude any particular person, or any class of persons, from the benefits of the use of the postal service. It has never decided that the general use of the mails is the exercise of a mere privilege to be granted or taken away by an executive officer.

There are apparently but two instances in the books where a Postmaster General has assumed to exercise authority over a citizen's general use of the mails. In *Hoover* v. *M'Chesney*, 81 Fed., 472, the Postmaster General issued a "fraud order" upon learning that complainant had been engaged about three months previously in conducting a lottery. The order was intended to and did deprive complainant of the use of the mails in *receiving* any mail matter of any kind or description. This Postmaster General assumed much the same position as respondent has assumed in the instant case. Because of alleged past violations of criminal statutes he

sought to prevent complainant from further use of the mails and thus prevent future violations which he assumed would occur. The question was thus squarely raised and the Court held that "the right to the use of the mail" was "a property right, and one which could not be taken away except by due process of law."

In the case of *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed., 579, the Postmaster General assumed in advance that what the newspaper would publish would be an advertisement of a lottery, and he instructed the local postmaster not to receive for mailing any copy of the paper which carried the advertisement he had in mind. The Court granted an injunction against him, saying that, as the mails had not yet been used, the postal law would not apply at all.

With these decisions in mind, the question involved becomes a simple one.

The Espionage Act merely provides that certain mail matter is "hereby declared to be non-mailable matter." In these seven words the respondent thinks he finds his authority to deny to relator all future use of the mails.

The issue should not be confused by the fact that respondent has merely concentrated his energies on the second-class right to which relator is entitled. The Espionage Act says not a word about the classification of the mails. If the act contains any justification for the respondent, that justification must be found in an authorization to exclude relator from *any use of the mails whatsoever*. The right involved is the right to use the mails generally, not the right to enjoy the privileges accorded by the second-class classification.

Now, how can there be found in these seven words the expression of an intention to impose as an additional penalty for previous violations of provisions of the Espionage Act a denial of any benefits to be enjoyed by

future use of the mails? Congress had used the words before, and even though we assume it believed it had the power summarily to destroy a citizen's right to use the mails for a lawful purpose, it had never presumed to exercise such a power. The farthest it ever went was in the "fraud order" legislation in which it was careful to delegate authority expressly and not by implication. And the authority it delegated was the authority to prevent an actually existing fraudulent use of the mails, not a presumed future fraudulent use. The limited power of the Postmaster General was confined to the time when a fraudulent scheme *"is being conducted."*

The character of this legislation and the language used prove conclusively that Congress did not impliedly make any such dangerous grant of power to an administrative officer,—dangerous because, whether the subject matter of such an implication be a "property right" as one Court says, or "a positive legal right," as the Court of Appeals says, or a "privilege," as the respondent says, it is indissolubly bound up with the most sacred of all rights, the right to life, liberty and the pursuit of happiness. The Espionage Act is a criminal statute and in its several provisions penalties are provided for specifically defined criminal *acts*. There is nothing in these provisions to indicate that Congress presumed to provide penalties for the harboring of a mere criminal intent, for a mere state of mind. A "seditious" statement was made a crime, and when that statement was put into a tangible form capable of being mailed it was declared non-mailable.

Section 1 of the 12th Title refers to "matter" or "things" that are capable of being mailed,—letters, pictures, books. A "newspaper" is the only one of the "things" enumerated which is ordinarily susceptible of definition as a continuing publication; but the word is

so used and the context is so plain that the reference is obviously to specific, published issues and not to contemplated publications, the contents of which do not exist and cannot be foretold. The language refers to something in existence and to human acts in respect thereto.

But let us assume, for argument, that one of those contemplated papers should carry an article in violation of the act. Then, and not till then, has a criminal act been committed and the subject matter of that act made non-mailable. But the respondent says that he will not accept in the second-class mail these future issues, irrespective of what they may contain. He, not the Espionage Act, declares them non-mailable in advance. Such a position is grotesque and a mere statement of it is its best refutation. He assumes a construction under which the act is supposed to punish mere criminal *intention* without any criminal *act* whatsoever coupled with it, when he assumes the criminality of the intention in relator's mind; and he bases that assumption on the further unsupported conclusion that the tendency of the relator's newspaper, in his opinion, is "seditious."

The absurdity of this position is further disclosed by the fact that respondent claims greater power under the so-called implications of the original Espionage Act than are actually granted to him under the amendments to that act. As the war progressed Congress put more teeth into the Espionage Act. It obviously decided that it should make a greater effort to close the mails to those who were using it to practice "espionage." Consequently, it added to Title XII a new section, Section 4, drawn in conformity with the old "fraud order" laws. "When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the

provisions of this Act," instruct his postmasters at post offices "at which mail is received addressed to such person or concern" to return to same marked, etc.

If he already had the power, as he contends, to deny any use of the mails whatsoever to those persons or concerns, then what did Congress intend by this amendment? If he already had the broadest powers that could be granted, what intention must we attribute to Congress in thus expressly granting him a much more limited power?

The Postmaster General will probably assert, as he did in the case of the *New York Call* (*United States of America, ex rel. Workingmen's Co-operative Publishing Association* v. *Burleson, supra*) that his action in revoking the second-class mailing permit of The Milwaukee Leader involved an exercise of judgment and discretion on his part and that the exercise of judgment and discretion by him and his action are not subject to be reviewed, reversed, set aside or controlled by a court of law, and that his action in that behalf cannot be commanded, directed or controlled by the writ of mandamus. The office of the Postmaster General is an important one, but it seems that the Postmaster General has an exaggerated understanding of his powers and an insufficient estimate of the power of the court. His acts with respect to the granting and revoking of second-class mailing permits are essentially ministerial acts and are subject to review by the courts. If this were not the fact, his would be a most autocratic power to destroy upon a mere whim or for no explained legal cause, any and every publication with whose politics and policies he did not agree. Whether a newspaper be Socialist, Republican or Democratic in its political sympathies, pro-administration or anti-administration, in favor of or against a declaration of war, in favor of or against a speedy termination of a war in progress—all these are questions which are not to be con-

sidered in connection with the granting or revocation of second-class mailing rights. The Postmaster General indicates that he does not approve of the tendency or policy of The Milwaukee Leader. The tendency or policy of The Milwaukee Leader as understood by the Postmaster General may be one thing and its actual policy as understood and advanced by its editor may be and in fact is quite a different thing. This policy has at no time in the course of the proceedings before the Postmaster General or in the pleadings before the Court in this action been defined, and it is quite immaterial what the policy may be. It is significant, however, that the question of a newspaper's policy is apparently being taken into consideration by the Postmaster General in determining whether or not it shall enjoy the second-class mailing rights which the statute decrees it is entitled to upon conforming with certain enumerated requirements. None of these requirements pertain to the question of policy, political or otherwise. It is a new and dangerous course which the Postmaster General has adopted. It is wholly contrary to the principles upon which this government exists. It is a usurpation of power, the unauthorized creation of a censorship which menaces the freedom of the press of America. It must be disapproved and overridden by the Court, which clearly has the right to review the acts of the Postmaster General in this action.

In *Schaefer* v. *United States*, 251 U. S., 466, which was a prosecution upon an indictment under the Espionage Act, Mr. Justice Brandeis, in a dissenting opinion, concurred in by Mr. Justice Holmes, said at page 494:

> "To hold that such publications can be suppressed as false reports, subjects to new perils the constitutional liberty of the press, already seriously curtailed in practice under powers assumed to have been conferred upon the postal authorities."

The reference made by the learned Justices to the assumption of powers by the postal authorities is of especial significance in the consideration of the circumstances of the present case.

The question to be determined by the Court upon this appeal is whether or not the Postmaster General is above the law and may create new laws to suit his convictions or prejudices.

To the Postmaster General is committed the duty of administering the Postal Laws, and this duty includes the granting of second-class mailing rights to such publications as conform with the statutory requirements. The Postmaster General is bound by law to grant the necessary permit and to admit the publication to the second-class mails. We have his admission that The Milwaukee Leader was entitled to second-class mailing rights, for it enjoyed those rights for a considerable period until they were arbitrarily and illegally withdrawn by the Postmaster General.

The nature of the publication has not changed. It is manifestly a daily newspaper under the law and one which comes within the second-class mail classification.

Whatever discretion the Postmaster General must exercise in considering and determining whether or not a publication is entitled to admission into the second-class mails is a discretion incident to the performance of ministerial duties and not an incident to the performance of judicial duties. Whether such discretion is incidental to the performance of ministerial or of judicial duties, the acts of the official performing them are nevertheless subject to review by the courts. In *West* v. *Hitchcock*, 19 App. D. C., 333, the relator sought a writ of mandamus to the Secretary of the Interior, and the Court said at page 342:

> "By a long and well known series of cases in the Supreme Court of the United States, from that

of *Marbury* v. *Madison*, 1 Cranch, 137, to that of *Roberts* v. *U. S.*, 176 U. S., 221, the law of mandamus has been well settled so far as it concerns the authority of the courts of the District of Columbia to issue that writ to the head of a department of the federal government or the chief of a bureau upon whom some such duty has been devolved by law. These decisions have firmly established the doctrine that the writ of mandamus will be issued to compel the performance of a ministerial duty by such officer, but that it will be refused when the duty required of him involves the exercise of judicial or quasi-judicial discretion. * * * It is conceded that the relator has taken all the steps and complied with all the requirements of the law to entitle him to his allotment and it is not controverted that he is a proper person to receive the allotment. * * * The sole defense interposed by the appellee to the relator's right in the premises is the proposition that the case is one wherein the Secretary of the Interior was required to exercise judgment and discretion, that the control of Indian affairs is a political function vested by Congress in the executive branch of the government, that the power to approve in this instance involved the power to disapprove, that this necessarily implies the exercise of judgment, that the refusal of the Secretary to approve the allotment amounts to a disapproval and rejection of it, and that any attempt to control his judgment therein would be an exercise of appellate power which is not given to the courts.

"We think that this proposition in the present case is based upon a misapprehension of the law and cannot be sustained.

"The fact that an act which mandamus seeks to compel is the culmination of a series of proceedings of a judicial or quasi-judicial nature or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus when the officer or person charged to perform it, arbitrarily and

without just legal cause refuses such performance. This is so even in reference to strictly judicial proceedings. For a trial court to settle a bill of exceptions or to approve an appeal bond is a judicial function requiring the exercise of judgment and discretion, and yet if the judge holding the trial court arbitrarily refuses to settle such bill of exceptions, when in due form it has been duly tendered to him, or arbitrarily refuses to approve such appeal bond, when it has been duly submitted to him for approval and is in all respects satisfactory and subject to no reasonable objection, it is elementary law which requires no elaboration and no citation of authority for its support, that, while his judgment may not be coerced, the performance of his duty may be required of him by means of the writ of mandamus. Indeed it may be laid down as a general rule, that, while the judgment of a judicial officer or of an officer charged with the performance of a judicial or quasi-judicial duty, will not be controlled through the writ of mandamus, and this writ will not be used as a means for the review of the exercise of such judgment, yet any act required by law to be done, whether in the course of judicial proceedings or otherwise, may be compelled by mandamus from a superior tribunal, or a tribunal of general jurisdiction, as the case may be, when its performance is withheld by a mere arbitrary exercise of power without just cause. There is no step in the course of judicial proceeding which may not be the subject of mandamus when its performance is unlawfully refused.

(p. 344) "Now if this be the case in strictly judicial proceedings, it is even more so in regard to the functions of executive officers in the performance of acts wherein individual citizens are interested. To grant a patent for lands, or for an invention in the arts or for a discovery in the sciences, is a quasi-judicial function of the highest nature which has been committed by Congress

to the executive officers of the government, and the granting or refusal of such a patent ordinarily cannot be questioned in the courts. But when all the proper prerequisites have been complied with and all the preliminary steps have been taken whereby a party has in law become entitled to a patent and nothing remains to be done but to issue the patent, it is well settled that such patent may not then arbitrarily and without just cause be withheld and that its execution and delivery may be enforced by the writ of mandamus. *Butterworth* v. *Hoe*, 112 U. S., 50; *United States* v. *Schurz*, 102 U. S., 378; *Dunlap* v. *Black*, 128 U. S., 40. It has been well said that under our republican system of government there is no place for the exercise of arbitrary power.

"It is not to be denied that, in the administration of the law the provisions of which it is sought here to enforce, a certain amount of discretion is reposed in the Secretary of the Interior and the officers of the Land Office under his control. But that discretion has been expended. It is conceded by the pleadings in this case that the relator has done everything required by the statute to be done by him; that he is a proper person to receive the allotment which he seeks; that his selection of land is right and proper; that such selection infringes no other right and that there is no reason whatever why his selection should not be approved. We may infer of course that there is some secret reason for disapproval not disclosed in the record; but if such secret reason there be, the courts can take no cognizance of it. The only ground whatever of objection set up to the writ is that the case is one involving the exercise of judgment and discretion on the part of the Secretary. But the plain answer to this argument is that the judgment and discretion have been exercised and that the only thing which now remains to be done is the final expression of that judgment, as in the case of *Butterworth* v. *Hoe*, *supra*, by the execu-

tion and delivery of a certificate of approval, which, in contemplation of law, is a purely ministerial duty.

(p. 346) "The history of adjudication on the subject of mandamus is sufficient to show that the courts should be cautious not to interfere with the independent freedom of action guaranteed by the Constitution and the laws to the executive officers of government; but it is also sufficient to show that the writ of mandamus will be freely resorted to in order to enforce individual right against arbitrary action, however well intended such action may be, when the relator has no other available remedy. *Roberts* v. *United States,* 176 U. S., 221."

In *Roberts* v. *United States,* 176 U. S., 221, the Court said at page 231:

"Unless the writ of mandamus is to become practically valueless and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must obey the law and he must therefore in a certain sense construe it in order to form a judgment from its language of what duty he is directed by the statute to perform. But that does not necessarily in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that

> the performance of the duty involved the construction of a statute by him and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court we think would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

No great exercise of judgment or discretion is necessary to determine whether or not a newspaper or periodical has conformed with the requirements of the statute pertaining to the admission of matter into the second-class mails. Nor does the Postmaster General assert that The Milwaukee Leader has in any way failed to conform with the requirements of the statute.

There is no question presented of a doubt as to the proper classification of the relator's publication. It is concededly a daily newspaper, although the Postmaster General has asserted that it is not a newspaper within the meaning of the law because it is in conflict with the Espionage Law, but this assertion cannot be taken seriously. The Espionage Law is in no way concerned with mailable matter which belongs to any special classification. The provisions of the Espionage Law governing non-mailable matter affect only particular books, papers and periodicals, etc., which contain matter which is in alleged violation of any of the provisions of the Espionage Law. The Espionage Law imposes no penalties with respect to abrogation of second-class mailing rights. Nor does the Postmaster General assert that the law gives him a right to inflict such a penalty.

A clear and controlling statement of the law governing

a proceeding of this kind was presented in the case of *Payne* v. *United States ex rel. National Railway Publishing Co.*, 20 App. D. C., 581. This was a mandamus proceeding to require the Postmaster General of the United States to admit into the mails, for transmission as second-class mail matter, a certain periodical publication, which the Postmaster General held to be mail matter of the third class. The publication was known as "The Official Guide of the Railways and Steam Navigation Lines of United States, Porto Rico, Mexico and Cuba," and was published monthly in New York. The Court said at page 596:

> "The principal question here, as in all cases of this character, is whether the act sought to be performed is of a ministerial or of a judicial character as those terms have been defined and limited by the courts. For, as pointed out in the case of the *United States ex rel. West* v. *Hitchcock*, 19 App. D. C., 333, there is no ministerial act to which the writ of mandamus would be applicable that does not in some measure and to some extent involve the exercise of judgment and discretion, and there are acts apparently judicial which are not so in contemplation of law. An act may be ministerial in this connection, although it may occur in the course of judicial proceedings or in the exercise of discretionary power, when it is merely a ministerial thing to be done after the judicial authority over the subject matter has been exercised. * * * It is very clear that the Congress of the United States has not committed to the Postmaster-general or to anyone else the matter of determining what should be carried in the mails as second class matter and what as matter of the third class. It has reserved that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster-general to add anything to the statute or to take anything from it. It may be that the classification has not been made with

all the definiteness that is desirable. It may be, even, that the privilege of the mails has been grossly abused by the introduction into them of mail matter of the second class which was never anticipated by Congress. * * * Yet it is not the province of the Postmaster-general to remedy the evil, if evil there is, by a postal regulation or by unwarranted interpretation of the law.

"The citizen who desires to have his publication carried in the mails of the United States as second class mail matter, and who has fully and fairly complied with all of the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be enforced by the writ of mandamus if the Postmaster-general arbitrarily or without valid legal reason refuses to receive and transmit such publication. Of course, the Postmaster-general and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute."

(p. 600) "It is conceded that the relator has complied with all the requirements of the statute and that the characteristics of its publication are literally and specifically as therein prescribed; and it appears that the exclusion of the periodical from the mails, as second class matter, is based exclusively and in express terms upon its failure to comply with the super-added requirement of the postal regulation that it must 'consist of current news.' Under the doctrine of the cases of *Butterworth* v. *Hoe*, 112 U. S., 50; *United States* v. *Schurz*, 102 U. S., 378; *Dunlap* v. *Black*, 128 U. S., 40; *Roberts* v. *U. S.*, 176 U. S., 221; *American School of Magnetic Healing* v. *McAnnulty*, at the present term (Oct. 1902), (187 U. S.); *U. S.* v.

Hitchcock, 19 App. D. C., 333, and other cases, we must hold that the ground of exclusion is insufficient in law and that the relator is entitled to the writ of mandamus for the enforcement of its right in the premises.

"Very greatly to the point is the case just cited of the *American School of Magnetic Healing* v. *McAnnulty*, decided November 17, 1902, by the Supreme Court of the United States, at its present term. There the Postmaster-general of the United States, called upon to construe and enforce the Act of Congress of September 19, 1900, to prevent the use of the mails for the collection of money by false and fraudulent devices, directed the exclusion from the mails of letters addressed to or intended for the American School of Magnetic Healing, an organization established at Nevada, in the State of Missouri, for the cure of all human ailments by mental or magnetic processes. There was great plausibility in his course and he was undoubtedly called upon to exercise a certain amount of judgment and discretion in the application of the law. But the Supreme Court, by Mr. Justice PECKHAM, said:

> 'That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action of the head or one of the subordinate officials of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law and in case an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief. * * *
>
> 'Here it is contended that the Postmaster-general has in a case not covered by the Acts of Congress excluded from the mails letters addressed to the complainants. His right to exclude letters or to refuse to permit their delivery to persons addressed must depend upon

some law of Congress and, if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, arguendo, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of of the Postmaster-general that such violation had occurred, based upon some evidence to that effect, would be conclusive and final and not the subject of review by any court. Yet to that assumption must be added the statement that if the evidence before the Postmaster-general in any view of the facts failed to show any violation of a Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because, the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster-general has ordered the retention of letters directed to the complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster-general, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

'The facts which are here admitted of record show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster-general has assumed to act and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts and the courts, therefore, must have power, in a proper proceeding, to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in

violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld. * * *

'Although the Postmaster-general had jurisdiction over the subject matter (assuming the validity of the acts) and, therefore, it was his duty, upon complaint being made, to decide the question of law, whether the case stated was within the statute, yet such a decision being a legal error does not bind the courts.'

"It seems to us that this case is decisive of that now before us."

In the case just cited a petition for a writ of certiorari to the Court of Appeals of the District of Columbia was granted by the United States Supreme Court (189 U. S., 512), and later upon motion of the Attorney General himself the appeal was dismissed with costs (192 U. S., 602).

As has been stated, the Espionage Law confers no power upon the Postmaster General to revoke second-class mailing privileges. A daily newspaper may consciously or unconsciously, with or without intent, publish matter which falls within the inhibition of the statute. It may publish such matter in several issues and it may then cease entirely publishing such matter, and its columns thereafter may be wholly free from any matter which may be objectionable under any statute. No statute and no court decision has ever gone so far as to forbid for all time the publication of a newspaper or its circulation through any classification of the mails because of one or more specific violations of law.

To justify the Postmaster General's conduct would necessitate a complete revision of our system of jurisprudence. It would be necessary to permit the Postmaster General to revise the Espionage Law, and to

strike from the United States Constitution that part of the First Amendment which prohibits Congress from making any law abridging the freedom of the press.

Society is composed of men of varying convictions and opinions. These convictions and opinions are expressed either verbally or in writing or through the far-reaching medium of the press. Only by free discussion of public questions can the nation progress. A nation which stifles free discussion, however displeasing such discussion may be to any group of officials temporarily in places of power, soon loses the respect of its citizens. In this country our system of law furnishes redress through the courts for any injustice practiced by a private individual or a public official. The Congress has enacted the Postal Laws for the salutary purpose of enabling the people of the country to communicate information and opinions to one another through the mails. The rights conferred by these statutes must be respected, and above all they must be respected by those public officials who are charged with their administration. It may be that the Postmaster General in the present case has acted in entire sincerity but through a misconception of his powers. The wrong to the relator that has resulted from the Postmaster General's wilful or perhaps unintentional misuse of his powers can be righted by this Court. The relator has shown that it has a clear legal right to the second-class mail classification. It is the Postmaster General's duty to continue the transmission of The Milwaukee Leader through the second-class mails. The existence of relator's right and the Postmaster General's duty are the sole essential prerequisites to the granting of the writ of mandamus which the relator applies for. The statute above quoted provides that a publication which conforms with the several conditions enumerated in the statute *shall be admitted to the second-class.* The Postmaster General

is the sole public official who has charge of the classification of mail matter and the administration of the Postal Laws. The statutory declaration that the publication shall be admitted to the second-class mails is an imperative mandate to the Postmaster General which he cannot evade, and having been admitted to said classification, it cannot be removed therefrom unless it has ceased to comply with the statutory requirements for second-class matter. The Milwaukee Leader has not ceased to be a daily newspaper conforming with those requirements. The Postmaster General's revocation of the second-class right, which the statute virtually commands him to continue, is tantamount to a violation of a public duty which the law of the land has expressly imposed upon him. That mandamus will lie in this case, there can be no question.

CONCLUSION.

The relief sought by the appellant, through the writ of mandamus for which the relator petitions, should be granted.

Dated, January 6, 1921.

Respectfully submitted,

S. JOHN BLOCK,

SETH SHEPARD,

Attorneys for Workingmen's Co-operative Publishing Association amicus curiae.

SUPREME COURT OF THE UNITED STATES.

No. 155.—October Term, 1920.

The United States of America *ex rel.* Milwaukee Social Democratic Publishing Company, Plaintiff in Error, *vs.* Albert S. Burleson, Postmaster General of the United States. | In Error to the Court of Appeals of the District of Columbia.

[March 7, 1921.]

Mr. Justice Holmes, dissenting.

I have had the advantage of reading the judgment of my brother Brandeis in this case and I agree in substance with his view. At first it seemed to me that if a publisher should announce in terms that he proposed to print treason and should demand a second-class rate it must be that the Postmaster General would have authority to refuse it. But reflection has convinced me that I was wrong. The question of the rate has nothing to do with the question whether the matter is mailable, and I am satisfied that the Postmaster cannot determine in advance that a certain newspaper is going to be non-mailable and on that ground deny to it not the use of the mails but the rate of postage that the statute says shall be charged.

Of course the Postmaster may deny or revoke the second-class rate to a publication that does not comply with the conditions attached to it by statute, but as my brother Brandeis has pointed out, the conditions attached to the second-class rate by the statute cannot be made to justify the Postmaster's action except by a quibble. On the other hand the regulation of the right to use the mails by the Espionage Act has no peculiarities as a war measure but is similar to that in earlier cases, such as obscene documents. Papers that violate the Act are declared non-mailable and the use of the mails for the transmission of them is made criminal. But the only power given to the Postmaster is to refrain from forwarding the